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IN THE

Supreme Court of the United States

Term, 1959

No. 219

ESTATE OF DANIEL MCNICHOL, deceased, by Ellen McN. Evangelista and Joseph G. McNichol, Executors,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI

To Review the Judgment of the United States Court of Appeals, third circuit, No. 12,756, affirming the Decision of the Tax Court of the United States, Docket No. 60,127.

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Respondent

PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Estate of Daniel McNichol, deceased, by Ellen McN. Evangelista and Joseph G. McNichol, Executors, hereby respectfully petitions your honorable Court for allowance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered April 17, 1959, affirming the decision of the Tax Court of the United States, and in support thereof, submits the following data:

OPINIONS BELOW

The opinion of the learned United States Court of Appeals, per Steel, D. J., filed April 17, 1959, is reported in 265 Fed. 2d 667.

The opinion of the learned Tax Court of the United States, per Train, J., is reported in 29 T. C. 125.

JURISDICTION

(i) Judgment of the learned U. S. Court of Appeals was entered April 17, 1959.

(ii) There was no order for re-hearing, nor any extension of time.

(iii) The statutory provision conferring jurisdiction on your honorable Supreme Court to review said judgment by certiorari is that contained in the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928, reading thus:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; . . ." (28 USCA 1254-1).

QUESTIONS PRESENTED FOR REVIEW

1. Are not the Federal tax laws to be strictly construed against the tax, and in favor of the taxpayer?

2. When the words of a law are clear and free from all ambiguity, may the letter of it be disregarded under the pretext of pursuing its spirit?

3. May indefeasible conveyances of the fee simple titles to real property, including all rents, issues, and profits thereof, be debased into lesser tenures by alleged "oral agreements" in violation of the Parol Evidence Rule and the Statute of Frauds?

4. Where a decedent, from December 30, 1939, to February 19, 1942, while he was in robust physical health and complete mental vigor from eleven to nine and one-half years before his death on June 17, 1951, indefeasibly conveyed away to his children, by formal written deeds, the fee simple titles to ten (10) parcels of tenant-occupied, income-producing real estate, including the grant of all the rents, issues, and profits thereof, without any retentions or reservations of anything whatsoever in himself, may the Commissioner of Internal Revenue include such properties in his gross estate merely because, by the tacit donative acquiescence of the children or unenforceable demands of the father, or his permitted trespasses, the decedent thereafter received and used some of said rents?

THE STATUTE INVOLVED

The questions presented involve the correct and definitive interpretation of section 811(c) of the U. S. Internal Revenue Code of 1939, being that part of the Act of Congress, February 10, 1939, Public No. 1, chap. 3, found in 53 Stat. (part I), p. 121, the lengthy provisions of which are quoted verbatim in the footnote to the opinion of the learned Court of Appeals below (appendix, p. 14), and also on pages 18a to 20a of the printed copies of petitioner's appendix in the court below, being there a footnote to the opinion of the learned Tax Court, also reported in 29 T. C. 125.

STATEMENT OF THE CASE

This petition seeks to persuade your honorable Supreme Court to review the judgment of the learned U. S. Court of Appeals, third circuit, affirming the decision of the U. S. Tax Court which sustained a claimed deficiency assessment in estate tax of $19,794.33, plus penalty of $2,624.79, to which has now been added more than $7,293.26 of interest thereon: a total in excess of $30,000.00, entered by the respondent, Commissioner of Internal Revenue, against the Estate of Daniel McNichol, deceased, petitioner.

The pertinent facts are as follows: On December 30, 1939, decedent, eleven and one-half years before his death on June 17, 1951, made an absolute, indefeasible, and unrestricted conveyance in fee simple by general warranty deed of all his title to income-producing, tenant-occupied real properties, 6200-02 Grays Avenue, and 2414 and 2416 So. 62nd Street, Philadelphia, Pa., to his sons, Joseph G., and Henry J. McNichol. Said deed shows on its face (p. 4, Deed Bk. DWH no. 888, p. 456; Appendix, pp. 9a-12a), that delivery thereof was accepted on behalf of said grantees-sons by Joseph P. Breslin, "agent for the grantees," who

so recorded it for them in the Recorder's Office at Philadelphia on January 5, 1940. By its express terms on page 3 thereof, said decedent specifically gave and conveyed away forever "all and singular the rents, issues, and profits" of said realty without any restriction, reservation, or retention as to possession or enjoyment, or as to rents or income whatsoever (Stip., par. p. 2a; exhbt. p. 2a).

On April 30, 1940, more than eleven years before death, decedent similarly conveyed by like deed premises 2443 and 2449 So. 62nd Street, and 6167 Elmwood Avenue, Philadelphia, Pa., to his son, John J. McNichol. This deed, too, was delivered to, and accepted and recorded May 11, 1940, by Joseph P. Breslin, as agent for the grantee (Stip. par. 2, p. 3a; exhbt. 3).

On November 6, 1941, more than nine and one-half years before death, decedent similarly conveyed by like deed premises No. 7000 Paschall Avenue, Philadelphia, Pa., to his daughters, Ellen Martha, and Rose Mary McNichol, and his son, James J. McNichol. This deed, too, was delivered to, and accepted and recorded November 12, 1941, by one Joseph Bentz, as agent for the grantees. (Stip., par. 2, p. 3a; exhbt. 4). And, on February 19, 1942, more than nine years and four months before his death, decedent similarly conveyed by like deed premises Nos. 6167, 6169 and 6171 Grays Avenue, Philadelphia, Pa., to his son James J. McNichol, and his daughters, Ellen Martha, and Rose Mary McNichol. This deed was also delivered to, and accepted and recorded March 19, 1942, by Joseph Bentz, as agent for the grantees. (Stip., par. 2, p. 3a; exhbt. 1, pp. 5a-9a).

These previously delivered and recorded documents were thereafter temporarily held for safe-keeping in the father's safe in the family home, access to which was available not only to decedent but also to his daughter, Ellen (now Mrs. Evangelista), but such mere custody was thereafter given by decedent to all of the respective grantee-

children no later than the year, 1942 (N. T., pp. 33, 82, 91). Not only from December, 1939, to February, 1942, during which the deeded transfers were made, but also up to the time of his sudden death in June, 1951, the decedent, Daniel McNichol, was at all times in excellent physical vigor and keenly alert mental health (N. T., pp. 31-33).

On August 15, 1942, pursuant to the requirements of the war-time, rent-control acts of Congress, all of the aforesaid parcels of tenant-occupied, income-producing real property, theretofore conveyed and delivered by decedent to his children, except 2439 So. 62nd Street (owned by John J. McNichol) and Nos. 6169 and 6171 Grays Avenue (owned by Ellen, Rose, and James J. McNichol) in which the names of the owners were obviously omitted by their filing-agents through inadvertence, were severally registered with the United States Office of Price Administration in the names of the aforesaid respective grantees, children of decedent, as the owner-landlords thereof entitled to the rental income of all said properties and the persons obliged to answer for infractions of Federal law (N. T., pp. 15-20, and P's Exhibit 7; p. 13a).

Decedent did not file any gift-tax returns on his said real property donations because he was not obliged to do so, since the amount of each such gift to each individual child did not equal $3,000 (N. T., p. 38). And none of decedent's children ever filed any gift-tax returns on his or her gift of rental incomes to the decedent because they were not obliged to do so, since the total of such rent gifts did not equal or exceed the sum of $3,000 per year. The largest rental-income gifts from any group of children-owners, those received from premises 6200 Grays Avenue and 2414 and 2416 South 62nd Street, Philadelphia, jointly owned by Joseph G. and Henry J. McNichol, totaled only $2,160 per year (P's Exhibit 7, p. 13a), or an aggregate separate gift of only $1,080 per year from each such donating son.

Possession and enjoyment of each of the said ten

parcels of real property so conveyed away by decedent was continuously in the several tenant-occupiers thereof who paid the rents therefor during the entire period from the date of execution of the deed to each property to the date of decedent's death on June 17, 1951. (Stip., pars. 2 and 3, exhibits 1 to 5; and P's exhibit, cont'g. the 15 O.P.A. rent-regs.—sample, p. 13a).

Petitioner concedes, however, as shown by the evidential facts below, that its decedent, Daniel McNichol, received some of the rents from some of said transferred properties, especially during the last three and one-half years of his life, 1948, 1949, 1950, and the first six months of 1951 up to the time of his death, as shown by decedent's income tax returns for those years (although such admissions were objected to, and motion to strike out was overruled). These receipts were had by decedent eight (8) years after his first transfer and almost six (6) years after his last transfer of said properties, either from the real estate brokers who collected them, or from his daughter-in-law, Mrs. Jeanette McNichol, who personally collected the rents from the tenants occupying the properties conveyed to her husband, Joseph McNichol. None of the children bothered to interfere with, or prevent, decedent's use or receipt of such monies. But the evidence conclusively shows that *decedent had no right to this rental income*, since he had *not retained such right to the income, nor had he retained any possession or enjoyment* therein, *under his said transfers, or anywhere else.*

Hence decedent received said rents solely by acquiescent implied gifts, or by the sufferance, of his children whose filial regard deterred their lawful rights to prevent such receipts, or by the trespasses of conversion after decedent had collected said rents from the two brokers who managed some of the properties, and who registered said properties in the names of the respective children-owners, pursuant to the war-time rent controls, with the U. S. Office of Price Administration.

BASES OF FEDERAL JURISDICTION BELOW

Federal jurisdiction below derives from the Act of Congress, dated August 16, 1954 (9:45 A. M., EDT), c. 736, 68 A. Stat. 890, being also in 26 U. S. C. A. #7482(a), reading as follows:

> "(a) Jurisdiction. The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the same manner provided in section 1254 of Title 28 of the United States Code."

REASONS FOR ALLOWANCE OF WRIT— ARGUMENT

1. THE LEARNED COURT BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION, THE INTERPRETATION OF SECTION 811(*c*) OF THE INTERNAL REVENUE CODE, IN A WAY THAT CONFLICTS WITH THE APPLICABLE CONTROLLING DECISIONS OF YOUR HONORABLE SUPREME COURT.

(a) The learned Court of Appeals below, by its decision herein, has *effectively overruled* the decision of your honorable Supreme Court in *Nichols v. Coolidge*, 274 U. S. 531 (1927). There, as here, an alleged "oral understanding" was claimed to debase a fee in realty transferred to

children into a lesser tenure by purportedly carving out a "life estate in possession and enjoyment." But this honorable Court very properly rejected such contention, and refused to permit the transferred realty to be includible.

Here, the learned Court below has taken exactly the opposite view. Although discussing *Nichols v. Coolidge*, *supra*, in its opinion (pp. 19-21, infra), the learned district judge, Steel (specially presiding in USCA), contends that the *Nichols v. Coolidge* line of decisions has been nullified by the *rationale* of *Comm'r. I. R. v. Church*, 335 U. S. 632 (1949). Neither this *Church* case nor its alleged *rationale* did any such thing. It overruled *May v. Heiner*, 281 U. S. 238 (1930), but it left *Nichols v. Coolidge* completely unscathed. Hence, with the single exception of *Harter v. U. S.*, 48 AFTR 1964, 55-1 USTC ¶11,503 (N. D., Okla., 1954), relied on below, the decisions below (both USCA and TC) are the *first* and the *only case*, in any Federal jurisdiction anywhere, to hold that the *receipt of a subsequent oral gift* from grantee to the grantor is a *retention by decedent under his written transfer*.

(b) Furthermore, the decision of the learned Court below expands the purport of the *Church* case not only far beyond the latter's *rationale*, but also beyond all reason. It minimizes the lawyer's *restrictive* references in the *Church* opinion to "a property right" in the income, "the right to the income", the "right to possess or to enjoy the property" and other expressions imputing legal collectibility of the income, all of which are inherent, as this Court so well decided, in the specific language used by Congress in §811(c), and substitutes therefor the parlance of the journalistic economist or sociologist by claiming that *Church's* tax "bite goes deeper" (p. 21, infra).

2. THE LEARNED COURT BELOW HAS HERE RENDERED A DECISION WHICH CONFLICTS, ON SEVERAL LEGAL QUESTIONS, NOT ONLY WITH APPLICABLE RULINGS OF THE SUPREME COURT AND WITH THE COURTS OF APPEALS IN OTHER CIRCUITS, BUT ALSO WITH ITS OWN PRIOR DECISIONS.

(a) The questions whether decedent, Daniel McNichol, in his formal fee simple deeds of transfer, did retain for his life either the "possession or enjoyment" of, or the "right to the income from," the realty conveyed away to his children, and, if he did not so retain thereunder, whether he could lawfully effect such a retention by a subsequent "oral understanding" for his receipt of some of the rents, are essentially questions of the apposite substantive property law of Pennsylvania. Nevertheless, the learned Court below holds (pp. 17-18, infra): "It is not necessary for us to delve into Pennsylvania law, for the question is not one of local law." This conflicts with the ruling of this Court in the *Church* case, supra, and its companion case of *Spiegel Estate v. Comm'r. I. R.*, 335 U. S. 701 (1949). In both of these cases the underlying question was "the possibility of reverter to the donor," pursuant to the instruments of transfer under the laws of New York and of Illinois respectively, and your decisions were predicated thereupon. "The nature of the ownership of property is determined by reference to the state law applicable thereto": *Harvey v. U. S.* (CA 7, Ill.), 185 F. 2d 463 (1950). Holding likewise are: *Slades Estate v. C. I. R.* (CA 2, 1951), 190 F. 2d 689, and *Zirjacks v. Scofield* (CA 5, 1952), 197 F. 2d 688, so that said ruling below is also contrary to the views of no fewer than three (3) other circuits on the same legal problem. The Court below thereupon not only ignores, but proceeds to decide this case contrary to the property law of Pennsylvania,

as enunciated by Mr. Justice A. M. Stearne in *Stewart v. Hooks*, 372 Pa. 542, 94 A. 2d 756, at page 758, as follows:

> "The contention that a constructive trust should be created whenever one person reposes such confidence in another as to transfer property upon an oral promise to reconvey (which is the rule suggested by comment c, Restatement, Trusts, #44) *was explicitly rejected in Brunier v. Stanert*, 369 Pa. 178, 185 A. 2d 130, 134."

(b) The learned Court below, holding that donor's *retention* of possession or enjoyment of, or the right to the income from, the property transferred need not be *under the transfer*, i. e., in the wording thereof, also conflicts with numerous decisions in other circuits, notably *C. I. R. v. Hind's Estate* (CA 5, Texas, 1950), 180 F. 2d 930; *C. I. R. v. Twogood's Estate* (CA 2, 1952), 194 F. 2d 627, as well as with its own prior decision in *Higgs Estate v. C. I. R.* (CA 3, 1950), 184 F. 2d 427, all of which were *decided upon and under the specific wording of* the respective *transfers* involved.

(c) The learned Court below, throughout its opinion, persistently uses the words: "retain" and "retention" in discussing and describing our decedent-donor's receipt of some of the income from the transferred realty, as though "retain" and "receive" were synonymous terms. Incontrovertible evidence in the decedent's deeds shows that he *retained nothing whatsoever*. Both the stipulations and the oral testimony clearly prove that both the "possession and enjoyment" of the transferred properties were always in the rent-paying, tenant-occupiers thereof, so that the real question herein ever was, and still is, "Although decedent did *receive* some of the rents from the transferred properties, did he *retain* the right to the income *under* his trans-

fers?" Constant, repetitive confusion of terms can never change the meanings of the words so used. "Retain" and "receive," derived as they are from wholly different Latin roots, can never be treated as synonymous when used in laws, or contracts, or other legal instruments. Moreover, the expressions: "*possession or enjoyment*" of, and "*the right to the income*" from, the property, as used in I. R. C., sec. 811(c), are obviously used as *mutually exclusive* terms, and not as alternative substitutes one for the other, as the erroneous rulings of the Court below presume to hold.

3. THE LEARNED COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, APPEARING THERE FOR THE FIRST TIME IN ANY U. S. COURT OF APPEALS, WHICH HAS NOT BEEN, BUT SHOULD BE, DEFINITIVELY SETTLED BY YOUR HONORABLE SUPREME COURT.

The unappealed ruling in the *Harter case*, *supra*, from the northern district of Oklahoma, was the first "break in the armor" of this Court's decision in *Nichols v. Coolidge*, *supra*. The holding by the Court below in the case here presented to your honorable Supreme Court is, therefore, the first and only appellate court ruling on the precise question of the subsequent "receipt of rents by a decedent-donor," as distinguished from "possession and enjoyment under a revocable written lease" by a similar decedent-donor in the *Nichols v. Coolidge* case. As a result of the *Harter* "break-through," petitioner is reliably informed, believes, and therefore avers that a large number of claims for *estate includibility* against many other taxpayers throughout the United States are being held in abeyance by the respondent, Commissioner of Internal Revenue, pending the final outcome of this *McNichol* case. At least two of these, one from Virginia and another from California, have been brought to petitioner's attention by re-

spective counsel in those states. For these reasons, too, we earnestly suggest that your honorable Supreme Court might do well to grant an allowance of the writ of certiorari in this case in order to assure a definitive decision on the precise questions here involved that will be authoritative in all jurisdictions subject to your Court's purview.

Wherefore, petitioner prays that Writ of Certiorari be granted.

Respectfully submitted by

JAMES J. REGAN, JR.,
Counsel for Petitioner

Dated: July 15, 1959.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Filed April 17, 1959

By STEEL, *District Judge*

More than nine years before his death, the decedent purported to convey certain income-producing real estate to his children. Thereafter, pursuant to an oral understanding with his children, the decedent continued to receive the rents from the properties until his death. The Tax Court held that the properties were includable in the decedent's gross estate under §811(c)(1)(B) of the *I.R.C.* of 1939[1]. 29 *T.C.* No. 125. That decision is before us for review.

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1. Section 811(c)(1) reads:

"§ *811. Gross Estate*

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

"(c) *Transfers in contemplation of, or taking effect at, death.*

"(1) *General rule.* To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

"(A) in contemplation of his death; or

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with

The following findings by the Tax Court are supported by the record and are accepted as a basis for our decision:

Between 1939 and 1942 the decedent, a Pennsylvania resident, executed general warranty deeds to his children for income-producing real estate, together with the rentals therefrom, which he owned in Pennsylvania. The deeds were recorded. They reserved no interest in the realty or rents to the decedent, and the decedent received no consideration in connection with the transaction. Following the execution of the last deed the grantees, as owners-landlords entitled to the rental income, registered the properties with the O. P. A.

Contemporaneously with and subsequent to the execution of the deeds, it was orally understood between the decedent and his children that the decedent should retain for his lifetime the income from the real estate. In accordance with this understanding the decedent actually received all of such income from the dates of the deeds to the time of his death.

In his federal income tax returns for 1948 to 1950, inclusive, and for the period from January 1, 1951, to the time of his death on June 17, 1951, the decedent reported the rents as his personal income [2]. In the same returns the decedent claimed as deductions depreciation, taxes and water rent applicable to the properties.

The petitioners contended before the Tax Court that under Pennsylvania law the deeds conferred upon the children a fee simple title, that the Pennsylvania statute of frauds barred the grantor from enforcing his oral understanding against his children, and that the grantor therefore had retained no "right" to the income "under" the

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any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

"(C) intended to take effect in possession or enjoyment at or after his death".

2. The record fails to reveal how the rents were treated in prior periods.

transfer within the meaning of the statute. The Tax Court rejected this argument and held that the Pennsylvania law was immaterial, and that the test of gross estate includability under §811(c)(1)(B) was a factual one; i.e., whether a decedent in reality had retained possession or enjoyment of the property. Finding that the collection of the rents by decedent pursuant to his understanding with his children constituted a factual enjoyment of the properties under the transfer, the Tax Court held that the properties were properly included in decedent's gross estate.

Petitioners argue that §811(c)(1)(B) is inapplicable to a transfer with a retained income interest unless that interest is reserved in the instrument of transfer. This argument is based upon the statutory provision that the income must be retained "*under*" the transfer. This is too constricted an interpretation to place on the statute. The statute means only that the life interest must be retained in connection with or as an incident to the transfer. That the reservation need not be expressed in the instrument of transfer is implicitly recognized by the reciprocal trust decisions. *Orris v. Higgins*, 180 F. 2d 537 (2d Cir. 1950); *Cole's Estate v. C. I. R.*, 140 F. 2d 636 (8th Cir. 1944); *Moreno's Estate v. C. I. R.*, 260 F. 2d 389 (8th Cir 1958). They hold that when two persons separately create equivalent trusts simultaneously, with income payable from each trust to the settlor of the other, the property transferred by each settlor is nevertheless subject to §811(c)(1)(B) even though neither trust instrument reserves any interest in the income to its settlor or refers to the companion trust. Petitioners' argument is irreconcilable with those holdings. It is also at odds with *Harter v. U. S.*, 48 AFTR 1964, 55-1 USTC ¶ 11,503 (N. D. Okla. 1954). Neither *Higgs Estate v. C. I. R.*, 184 F. 2d 427 (3d Cir. 1950), nor *C. I. R. v. Twogood's Estate*, 194 F. 2d 627 (2d Cir. 1952), relied upon by petitioners bear upon the problem.

Next, petitioners point out that the statute speaks of the retention of "the right to the income". Emphasizing the

word "right", petitioners argue that Congress has decreed that §811(c)(1)(B) is applicable only if a transferor reserves to himself an enforceable claim to the income. Since, according to petitioners, the statute of frauds of Pennsylvania would foreclose judicial enforcement of the oral understanding between the decedent and his children, petitioners conclude that the decedent had no "right" to the income from the property [3].

It is not necessary for us to delve into Pennsylvania law, for the question is not one of local law. Rather, it is whether Congress intended that §811(c)(1)(B) should subject to an estate tax property conveyed under circumstances which here prevail. While state law creates legal interests and rights, it is the federal law which designates which of these interests and rights shall be taxed. *Morgan v. Commissioner*, 309 U. S. 78, 80-81 (1940); *Helvering v. Stuart*, 317 U. S. 154, 162 (1942).

In seeking to discover the type of transfers at which §811(c)(1)(B) is aimed, the words "right to the income" are not entitled to undue emphasis. Section 811(c)(1)(B) states that property which has been transferred *inter vivos* is includable in the gross estate of a decedent when the decedent "has retained for his life . . . the possession or enjoyment of, or the right to the income from the property . . .". Thus, the statute deals with two things: retention of "possession or enjoyment" and retention of "the right to the income".

The history of the statute discloses that "the right to

3. The law of Pennsylvania seems not to be as unqualified as petitioners state. If the decedent's children had refused to honor their oral agreement and had collected the rent themselves, the statute of frauds would not have barred the decedent from recovering the rents from the children if, as in the case at bar, they admitted the existence of the oral agreement. Under the circumstances hypothesized decedent would have had an enforceable claim against his children. *Metzger v. Metzger*, 338 Pa. 564, 14 A. 2d 285 (1940); *Kaufman v. Kaufman*, 266 Pa. 270, 109 Atl. 640 (1920).

the income" clause was not intended to limit the scope of the "possession or enjoyment" clause used in §811(c)(1)(B)[4]. Section 811(c)(1)(B) derives directly from §302(c) of the Act of 1926, as amended in 1931 and 1932. The amendment of 1931 included for the first time express language taxing property which had been transferred *inter vivos* with a lifetime retention of "the possession or enjoyment of or the income from" the property. This amendment said nothing about the "right to" income. The words "right to" were inserted for the first time by the 1932 amendment, and the language of the 1932 amendment was carried over into §811(c) of the *I. R. C.* of 1939. This insertion was to make clear that Congress intended that the statute should apply to cases where a decedent was entitled to income even though he did not actually receive it. H. R. Rep. No. 708, 72d Cong.; 1st Sess. pp. 46-47 (C. B. 1939-1, Part 2, pp. 490-91); Sen. Rep. No. 665, 72d Cong., 1st Sess. pp. 49-50 (C. B. 1939-41, Part 2, p. 532)[5] Hence, the "right to income" clause, instead of circumscribing the "possession or enjoyment" clause in its application to retained income, broadened its sweep.

The conclusion is irresistible that the petitioners' decedent "enjoyed" the properties until he died. If, as was

4. Section 811 makes two references to "possession or enjoyment". The first is in §811(c)(1)(B) where "under" the transfer the transferor "retained for his life . . . possession or enjoyment . . .". The second is in §811(c)(1)(C) where the transfer was "intended to take effect in possession or enjoyment" at or after the transferor's death. See fn. 1. Why there should be a dual reference to "possession or enjoyment" has been queried. *Commissioner v. Estate of Church*, 335 U. S. 632, 660, fn. 9.

5. In referring to the changes made by the 1932 Act to the Joint Resolution of March 2, 1931, H. R. Rep. No. 708 states:

> "(3) The insertion of the words 'the right to the income' in place of the words 'the income' is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change."

Sen. Rep. No. 665 says the same thing.

said in *Commissioner v. Estate of Church*, *supra*, p. 645, the most valuable property attribute of stocks is their income, it is no less true that one of the most valuable incidents of income-producing real estate is the rent which it yields. He who receives the rent in fact enjoys the property. Enjoyment as used in the death tax statute is not a term of art, but is synonymous with substantial present economic benefit. *Commissioner v. Estate of Holmes*, 326 U. S. 480, 486 (1945). Under this realistic point of view the enjoyment of the properties which the decedent conveyed to his children was continued in decedent by prearrangement and ended only when he died. The transfers were clearly of a kind which Congress intended that §811(c)(1)(B) should reach.

This conclusion, petitioners insist, is irreconcilable with the decisions in *Nicholas v. Coolidge*, 274 U. S. 531 (1927) and in *Burr's Estate*, 4 T.C.M. 1054 (1945); *Scheide's Estate*, 6 T.C.M. 1271 (1947), and *Richards' Estate*, 20 T. C. 104 (1953). The cited Tax Court decisions may be dispatched summarily. In none of them did it appear, as it does in the case at bar, that the transferee retained the income from the transferred property by virtue of an understanding between the transferor and transferee at the time of the transfer[6].

Nichols v. Coolidge, *supra*, however, may not be so readily disposed of. There, the grantor without consideration had conveyed the fee of her residences to her children, with a contemporaneous lease back for a nominal consideration. It was understood that the lease would be renewed so long as the grantor desired. Four years later the grantor died. The Commissioner included the realty in the decedent's gross estate under §402 of the Act of 1919 on the ground that the transfer was "intended to take effect in possession or enjoyment at or after death". The District

6. We intimate no opinion as to whether we would have followed these decisions if, in the case before us, the decedent had received the rents following the transfer without an agreement with his children that he might do so.

Court held that the Commissioner's action was unauthorized. It reasoned that the grantor had no "valid agreement" for the renewal of the lease, that the conveyance gave the grantees full possession and enjoyment of the properties, and that the transaction vested in the grantees "complete title". The Supreme Court affirmed upon the basis of the District Court decision.

The present-day importance of *Nichols v. Coolidge* can be understood only when it is viewed in its historical setting. The statute under which it was decided provided that property transferred *inter vivos* should be included in the gross estate of a decedent when the transfer was

> ". . . in contemplation of or intended to take effect in possession or enjoyment at or after his death."

Interpreting this same statutory language four years later, the Court held in *May v. Heiner*, 281 U.S. 238 (1930) that property which had been irrevocably transferred under a formal agreement of trust reserving to the settlor an interest in the income terminable at his death was not includable in the gross estate of the settlor since the title had vested in the transferee at the time of transfer. Although *May v. Heiner* made no reference to *Nichols v. Coolidge*, both decisions turned upon the fact that legal title had been technically transferred prior to death, and hence the transfer was not "intended to take effect in possession or enjoyment at or after death". This dispositive principle was reaffirmed on March 2, 1931, in *Burnett v. Northern Trust Co.*, 283 U. S. 782 (1931); *Morsman v. Burnett*, 283 U. S. 783 (1931), and *McCormick v. Burnett*, 283 U. S. 784 (1931), by *per curiam* decisions based upon *May v. Heiner*. These decisions upset the long-standing Treasury interpretation of the "intended to take effect in possession or enjoyment" clause which had been in the Revenue Act since 1916[7].

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7. The history of the "possession or enjoyment" clause, is detailed in *Commissioner v. Estate of Church*, *supra*, pp. 637-639.

The following day Congress, in order to close the obvious tax loophole which the decisions had opened, adopted the Joint Resolution of March 3, 1931. This resolution redefined the phrase "intended to take effect in possession and enjoyment at or after death" so that it would include a transfer under which the transferor "retained for his life . . . the possession or enjoyment of, or the income from" the transferred property[8]. This provision and its substantial embodiment in later amendments to the Revenue Act made taxable property which had been transferred *inter vivos* under a formal declaration of trust with a life estate reserved to the settlor. That was its purpose. By this resolution Congress rejected the view of *May v. Heiner* and its progeny that estate tax includability depended upon whether or not title had technically passed. Cf: *Hassett v. Welch*, 303 U. S. 303, 309-10 (1938). The premise of *Nichols v. Coolidge* was precisely the same as that of *May v. Heiner;* hence, the effect of the Joint Resolution was to undo *Nichols v. Coolidge* as well. Since Congress barred resort to formal trust agreements with reserved life estates as a means of circumventing the payment of death taxes, it is unreasonable to conclude that it intended to permit the accomplishment of the same result by an oral agreement having an identical effect.

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8. Section 302(c) of the Act of 1926 as amended by the Joint Resolution of March 3, 1931, taxed *inter vivos* transfers by trust or otherwise,

> ". . . in contemplation of or intended to take effect in possession or enjoyment at or after (the transferor's) death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property . . .*".

The italicized words were added by the Joint Resolution of March 3, 1931.

The phrase "the income from", which was placed in the statute by the Joint Resolution of March 3, 1931, was changed to read 'the right to the income from" by §803(a) of the 1932 Act. See discussion at pp. 5-6 of this opinion.

The saying that a man is as good as his bond is an expression born of experience which fortunately is not too uncommon. And when filial devotion and respect in fact justifies the faith which a parent reposes in his children in transferring property to them upon their oral assurance that the income is to be his for life, it is entirely artificial to hold that the parent did not retain the enjoyment of the property until his death simply because his receipt of its income accrued under an oral agreement rather than one more formal in nature. Nothing in the language of §811-(c)(1)(B) suggests that such a tenuous distinction was intended.

What we have said finds substantiation in the basic philosophy of *Commissioner v. Estate of Church*, *supra*, which expressly repudiated *May v. Heiner*[9]. The *Church* opinion emphasizes that the criterion for determining whether property transferred *inter vivos* is subject to a death tax is the effect of the transfer, and states that whenever in fact the ultimate possession or enjoyment of property is held in suspense until the death of the transferor, the property is swept into the decedent's gross estate by the statute. Substance and not form is made the touchstone of taxability. The Court holds that an estate tax cannot be avoided by a gift unless it is (p. 645):

> ". . . a bona fide transfer in which the settlor, absolutely, unequivocably, irrevocably, and without possible reservations, parts with all of his title and all of his possession and all of his enjoyment of the transferred property. . . ."

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9. *Church* involved an interpretation of the "intended to take effect in possession or enjoyment" clause as it applied to a transfer in 1924. It was necessary to resort to this clause because *Hassett v. Welch*, *supra*, had held that the Joint Resolution of March 3, 1931, as amended in 1932, was inapplicable to prior transfers.

In the case at bar we are enjoined by §811(c)(1)(C)(2) of the 1939 *I. R. C.* from applying the "intended to take effect in possession or enjoyment" clause.

It is true that the *Church* opinion refers to "a property right" in the income, "the right to the income", the "right to possess or to enjoy the property" and other expressions which may be pointed to as imputing legal collectability of the income. The *Church* language was, of course, patterned to fit the situation with which the Court was dealing, i. e., a transfer of property under a formal trust agreement in which the trustor retained an enforceable right to the income. But as we read the decision its bite goes deeper; and the opinion constitutes a sweeping and forthright declaration that technical concepts pertaining to the law of conveyancing cannot be used as a shield against the impact of death taxes when in fact possession or enjoyment of the property by the transferor—and more particularly his enjoyment of the income from the property—ceases only with his death.

Section 7(b) of the Technical Changes Act of 1949, 63 *Stat.* 895, did not impugn the basic soundness of the *Church* concept of "possession and enjoyment". While it nullified the prospective effect of the *Church* decision in its application to transfers antedating the Joint Resolution of 1931, this simply reflected Congressional solicitude for taxpayers who, in reliance upon *May v. Heiner*, had refrained from divesting themselves of life estates reserved under trusts created prior to the Joint Resolution of 1931. See Sen. Rep. No. 831, 2 U. S. C. & Cong. Serv., 81st Con., 1st Sess. 1949, pp. 2172, 2180. Since the transfers at bar were effected between 1939 and 1942 the *rationale* of the *Church* case is directly apposite.

The decision of the Tax Court will be affirmed.

JUDGMENT

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

April 17, 1959